

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3367

KIM M. FILARSKY,

Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS

Appellee

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APPELLANT'S REPLY ARGUMENTS

I. The Board misinterpreted the term functional loss when it relied solely on the Veteran's mechanical range of motion measurements to deny her an increased rating for her cervical spine disability.

The Secretary asserts that the Board “specifically considered functional loss . . . but found that Appellant’s symptoms were already contemplated by her 10 percent disability award.” Sec. Brief at 11-12. This is incorrect. As discussed in the Appellant’s opening brief, the Board’s *reasoning* demonstrates that it relied solely on the Veteran’s range of motion measurements to deny her a higher rating. Apa. Open. Brief at 8-9, 10-14; R-12-13 (1-19). There is a difference between the Board saying that it considered the Veteran’s evidence of functional loss and the Board actually analyzing that evidence. *See Dennis v. Nicholson*, 21 Vet.App. 18, 21-22 (2007). Here, the Board did only the former. It limited the rating because “the Veteran maintained forward flexion of the cervical spine to 45 degrees and there was no additional loss [of] motion following repetitive use testing.” R-13. By limiting its analysis to just the range of motion testing, the Board misinterpreted the law and failed to provide adequate reasons or bases for its decision.

The Veteran’s clinical range-of-motion measurements on two isolated dates do not sufficiently represent her level of impairment over the course of six years. *See* R-12-13; R-853 (851-55); R-1127 (1122-31). It is the Board’s responsibility “to interpret reports of examination in the light of the whole recorded history, reconciling the

various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present.” 38 C.F.R. § 4.2 (2016). Rather than merely parrot these range of motion measurements and match them to the rating criteria, the Board should have analyzed the VA examinations within the larger context of the Veteran’s lay statements and the medical evidence discussing functional loss.

Where the Board considers entitlement to a higher rating under section 4.40, it must assign a rating “based on the § 4.71a criteria.” *Thompson v. McDonald*, 815 F.3d 781, 785 (Fed. Cir. 2016). This is because “§ 4.40 never explicitly lists any actual disability ratings.” *Id.* However, nothing in the section 4.71a rating criteria requires *objective* evidence to demonstrate additional functional loss in range of motion. In other words, as Ms. Filarsky argued in her opening brief, a veteran’s range of motion may measure to a certain degree on objective examination and yet be further limited in her everyday life, due to her functional loss. *See* Apa. Open. Brief at 11-12. It is not a matter of weighing the range of motion testing *against* the evidence of functional loss: it is a matter of viewing the two in tandem. *See* 38 C.F.R. § 4.10 (2016) (“the basis of disability evaluations is the ability of the body . . . to function under the ordinary conditions of daily life . . .”).

This is precisely the situation contemplated by sections 4.40 and 4.45. *See* Apa. Open Brief at 11-12. The Board’s focus on the Veteran’s range of motion measurements only on examination is a misinterpretation of these regulations. It completely failed to explain how the Veteran’s functional limitations, which included

constant posterior neck pain, unrelieved with physical therapy, difficulty with sleep, difficulty at work with computer use, pain with activity and prolonged sitting, decreased manual dexterity, and problems with lifting and carrying were only equivalent to a 10 percent rating. R-554, 555, 560; *see also* 38 C.F.R. § 4.40 (2016) (noting disability “is primarily the inability . . . to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance.”). Had the Board done more than pay mere lip service to the Veteran’s functional loss, R-12-13, it may have determined that her cervical spine disability warranted a higher rating to account for all the effects of her disability. Therefore, remand is required.

II. The Board did not adequately explain its finding that referral for extraschedular consideration was not warranted.

1. The Board provided inadequate reasons or bases for its determination.

In her opening brief, the Veteran argued that the Board erred when it determined a referral for extraschedular consideration was not warranted, because notwithstanding the fact that she reported to an October 2010 treatment provider that she had muscle spasms, the Board stressed that there was “no evidence of muscle spasm severe enough to result in an abnormal gait or abnormal spinal contours such as scoliosis, reversed lordosis, or abnormal kyphosis.” *Apa. Open. Brief* at 14-15; *see* R-12, R-851-56; *see also, e.g.,* R-561 (May 2008 VA treatment note reflecting some spasm present); R-696 (May 2011 treatment note indicating palpable trigger

point/spasm); R-363 (359-69) (June 2014 VA examination wherein muscle spasms are noted). Furthermore, the Veteran argued that the Board did not explain why 38 C.F.R. § 3.321(b)(1) (2016) could not be applied to fill the gap in light of her demonstrated poor posture and significant bilateral rounded shoulders. *See Johnson v. McDonald*, 762 F.3d 1362, 1366 (Fed. Cir. 2014) (noting that “§ 3.321(b)(1) performs a gap-filling function”).

The Secretary responds by asserting that “[a]s there is a presumption that the Board considered all of the evidence of record, and the Board decision should be read as a whole, the Board’s statement is understandable and facilitative of judicial review.” Sec. Brief at 15 (internal citation omitted). However, the Secretary’s litigating position is a mere *post hoc* rationalization for the Board’s actions and should be given no weight. *See Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 156 (1991) (“[L]itigating positions’ are not entitled to deference when they are merely appellate counsel’s ‘post hoc rationalizations’ for agency action, advanced for the first time in the reviewing court.”)

The Board must consider referral for extraschedular consideration “[w]here there is evidence in the record that shows exceptional or unusual circumstances or where the veteran has asserted that a schedular rating is inadequate.” *Colayong v. West*, 12 Vet.App. 524, 536 (1999); *see also Thun v. Peake*, 22 Vet.App. 111, 115 (2008).

Here, the Board found:

The Veteran's cervical spine is manifested by pain. The rating criteria specifically contemplate such symptomatology. Therefore, the schedular criteria are adequate to evaluate the Veteran's disability.

R-15. As noted above, Appellant's cervical spine disability is productive of a multitude of symptoms aside from pain. The Board's failure to consider those symptoms when addressing the first prong of *Thun* renders its statement of reasons and bases for denying a referral for extraschedular consideration inadequate. Therefore, remand is necessary.

2. *The Board failed to adequately explain why referral was not necessary to consider the collective effect of all of the Veteran's service-connected disabilities.*

In her opening brief, the Veteran argued that the Board erred when it failed to explain why referral for extraschedular consideration was not necessary to consider the collective effect of all of the Veteran's service connected disabilities, even though the Veteran specifically raised this issue. *Apa. Open. Brief* at 17; *see Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016) (holding "the Board is required to address whether referral for extraschedular consideration is warranted for a veteran's disabilities on a collective basis only when that issue is argued by the claimant or reasonably raised by the record").

The Secretary responds by asserting that "Appellant did not expressly raise the issue, nor is it reasonably raised by the evidence of record." *Sec. Brief* at 16.

However, the Secretary is incorrect. As explained in the Veteran's opening brief, Ms. Filarsky specifically raised the issue of the combined effect of multiple conditions

affecting her ability to work in her application for increased compensation based on unemployability. Apa. Open. Brief at 17; *see* R-91-93. In fact, Ms. Filarsky specifically explained that due to the “weakness and pain” in her arm and neck she cannot lift patients anymore or sit at a computer to chart nursing notes. R-93. Therefore, because the issue of the combined effect of her service-connected disabilities was argued by Ms. Filarsky, the Board was required to address it. *See Yancy*, 27 Vet.App. 495. Its failure to do so was prejudicial to the Veteran because had the Board addressed the combined effects of her service-connected disabilities it may have found that referral for extraschedular consideration was warranted on that basis. Therefore, remand is necessary.

3. *The Board’s decision not to refer the Veteran’s increased rating claim for extraschedular rating consideration was premature in light of the fact that it remanded the issue of entitlement to TDIU for additional development.*

The Secretary concedes that the Board remanded the issue of TDIU, but argues that “*Brambley v. Principi*, 17 Vet.App. 20 (2003) and *Todd v. McDonald*, 27 Vet.App. 79 (2014) are distinguishable,” and that “Appellant’s argument that the Board’s determination was premature is without merit.” Sec. Brief at 16-17. However, the Secretary’s argument misinterprets the law and should be given no weight.

In *Brambley*, 17 Vet.App. at 24, the Court specifically held that “it was premature for the Board to decline extraschedular consideration where the record was significantly incomplete in a number of relevant areas probative of the issue of

employability.” *See also Todd*, 27 Vet.App. at 90-91 (affirming the holding in *Brambley*). Although it is well settled that extraschedular consideration and TDIU issues are not necessarily “inextricably intertwined,” *Colayong*, 12 Vet.App. at 537; *see Kellar v. Brown*, 6 Vet.App. 157, 162 (1994), both adjudications require a complete picture of the Veteran’s service-connected disability and its effect on his employability. 38 C.F.R. §§ 3.321(b)(1), 4.16 (2016); *see also* 38 C.F.R. §§ 4.1, 4.2, 4.10 (2016).

Moreover, as discussed above, the Federal Circuit has held that the “plain language of § 3.321(b)(1) provides for referral for extraschedular consideration based on the collective impact of multiple disabilities.” *Johnson*, 762 F.3d at 1365.

Therefore, in light of the fact that the Board remanded the issue of entitlement to TDIU for additional development, R-16, it was error for the Board to decline referral for extraschedular rating consideration pending the outcome of the additional development that was ordered. *See Brambley*, 17 Vet.App. at 24 (Board did not provide an adequate statement of reasons or bases for its decision not to refer veteran’s claim for extraschedular consideration where Board concluded that the record did not support such referral, but at the same time remanded the issue of entitlement to TDIU for further development; both adjudications require a complete picture of the veteran’s service-connected disabilities and their effect on employability); *see also Todd*, 27 Vet.App. at 90-91.

The evidentiary development ordered by the Board could serve to produce evidence that reasonably raises the question of whether referral for extraschedular

rating consideration is warranted. *See Yancy*, 27 Vet.App. at 495 (the Board is required to address whether referral for extraschedular rating consideration is warranted for the veteran's disabilities on an individual or collective basis when that issue is reasonably raised by the evidence of record). The Court has made clear that "[a]lthough the first and second *Thun* elements involve separate factual questions, both inquiries require a full and accurate description of a claimant's disability picture." *Id.* at 494 (emphasis added). Accordingly, the Board's decision not to refer the Veteran's claim for extraschedular rating consideration was premature. Such error was prejudicial to the proper adjudication of the Veteran's claim and therefore requires remand.

CONCLUSION

Ms. Filarsky's 10 percent rating for her service-connected cervical spine disability, prior to June 4, 2014, only contemplates the limited range of motion she demonstrated on examination. The Board erred when it failed to analyze whether the functional effects of the Veteran's cervical spine disability, including constant posterior neck pain, unrelieved with physical therapy, difficulty with sleep, difficulty at work with computer use, pain with activity and prolonged sitting, decreased manual dexterity, and problems with lifting and carrying are adequately contemplated by her 10 percent rating. Had the Board properly interpreted the law, it may have determined that the Veteran was entitled to higher ratings, either under the rating schedule pursuant to section 4.40 or via extraschedular referral. For the foregoing reasons, along with those presented in her opening brief, Ms. Filarsky respectfully

requests that the Board's decision be vacated and her appeal remanded so that it may properly adjudicate her entitlement to an increased rating.

Respectfully submitted,
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